TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 418.

THE UNITED STATES, PLAINTIFFS,

vs.

STEPHEN I. SIMMONS.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 13, 1876.

1 UNITED STATES OF AMERICA:

Circuit court of the United States, eastern district of New York.

THE UNITED STATES
against
STEPHEN I. SIMMONS.

This was a proceeding by indictment found against the defendant at the November term, 1874, of the circuit court of the United States for the eastern district of New York, in the second circuit.

The indictment contained four counts, and charged the defendant with a violation of certain provisions of the Revised Statutes of the United States relating to distilled spirits.

The first count was drawn under section 3258 of the Revised Statutes; the second count under section 3266 of the same; the third under section 3259 of the same; and the fourth under section 3281 of the same.

2 The defendant pleaded not guilty, and the case duly came on for trial at the November term, 1875, of said court, before the honorable Charles L. Benedict, district judge, sitting as a circuit judge in said district, and a jury.

On the trial, objection having been taken by the accused that the fourth count of the indictment was insufficient to permit proof to be given of the failure of the accused to give the bond required to be given by distillers, said objection was sustained by the court, and in accordance with such ruling no evidence was given on the trial, under the fourth count, in respect to the alleged failure of the accused to give a bond required from distillers.

The case was submitted to the jury upon the proofs adduced by the district attorney and by the accused, and the jury, after deliberation upon such evidence, rendered a verdict of guilty on each of the counts in said indictment.

Thereupon the district attorney moved the court for judgment and sentence, whereupon the accused moved the court in arrest of judgment.

3 At the January term, 1876, of said circuit court, said motion duly came on to be heard, before the honorable Alexander S. Johnson, circuit judge, and the Hon. Charles L. Benedict, district judge, and on the hearing thereof, the first and third counts having been held defective, the following questions arose under the second count, which is as follows:

SECOND COUNT.

And the jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that Stephen I. Simmons, late of the city of Brooklyn, county of Kings, in the district aforesaid, heretofore, to wit, on the 28th day of August, in the year one thousand eight hundred and seventy four, and on divers other days and times between the first days of May, in the year one thousand eight hundred and seventy-four, and the twenty-eighth day of August, in the year one thousand eight hundred and seventy-four, at Grand street, in the city of Brooklyn, in the eastern district of New York, and within the jurisdiction of this court, did, knowingly and unlawfully, cause and procure to be used a still, boiler, and other vessel for the purpose of distilling within the intent and meaning of the internal-revenue laws of the United States, in a

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certain building and on certain premises where vinegar was manufactured and produced, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

First. Whether it is sufficient in an indictment drawn under that portion of section 3266 of the Revised Statutes of the United States which prohibits the use of a still, boiler, or other vessel for the purpose of distilling in any building or on premises where vinegar is manufactured or produced, to charge the offence in the words of the statute.

Second. Whether the omission from the second count of the indictment of an averment that the distilling there referred to was distilling alcoholic spirits is a valid objection to said count.

5 Also, that on said motion the following questions arose under the fourth count of said indictment, which is as follows:

FOURTH COUNT.

And the jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that Stephen I. Simmons, late of the city of Brooklyn and county of Kings, in the district aforesaid, heretofore, to wit, on the 28th day of August, in the year of our Lord one thousand eight hundred and seventy-four, and on divers other days and times between the first day of May, in the year eighteen hundred and seventy-four, and the twenty-eighth day of August, in the year eighteen hundred and seventy-four, at the city of Brooklyn, in the eastern district of New York, and within the jurisdiction of this court, did, knowingly and unlawfully, carry on the business of a distiller, within the intent and meaning of the internal-revenue laws of the United States, without having given a bond as required by law, by the statutes of the

6 United States in such case made and provided required to be given by every distiller, and did, knowingly and unlawfully engage in and carry on the business of a distiller within the intent and meaning of the internal-revenue laws of the United States, with intent to defraud the United States of the tax on the spirits distilled by him, against the peace of the United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

First. Whether it is sufficient in an indictment drawn under that portion of section 3281 of the Revised Statutes of the United States which prohibits the carrying on of the business of a distiller with intent to defraud the United States of the tax on spirits distilled, *it is sufficient* to charge the offence in the words of the statute.

Second. Whether it is a fatal objection to the fourth count of said indictment that there is omitted therefrom an averment of the particular means employed by the accused to defraud the United States

7 of the tax on the spirits distilled by him.

Third. Whether that portion of the fourth count which charges the accused with carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him is a valid count upon which, with the verdict, judgment can be pronounced against the defendant.

On each and all of which said questions the opinions of said judges were opposed.

And thereupon, on motion of the district attorney, for and in behalf of the United States, in and for said district, it was, at the May term,

1876, of said court, ordered that the foregoing statement of facts, and the said questions upon which the said judges were so opposed, should be certified under seal to the Supreme Court of the United States, at their next session, for a final decision.

ALEXANDER S. JOHNSON,
Judge of the United States in and for the Second Circuit.

8 CHA'S L. BENEDICT,
Judge of the District Court of the United States for the Eastern District of New York.

UNITED STATES OF AMERICA,
Eastern District of New York:

OFFICE OF THE CLERK OF CIRCUIT COURT OF THE UNITED STATES:

B. Lincoln Benedict, clerk of the circuit court of the United States for the eastern district of New York, certify the foregoing to be a true statement of the points upon which the opinion of the judges of the circuit court of the United States for the eastern district of New York, in the second circuit, were opposed.

Stated under the direction of said judges.

B. LINCOLN BENEDICT, *Clerk.*

(Indorsement on cover:) No. 418. The United States, plaintiff, vs Stephen I. Simmons. E. New York C. C. U. S. Filed 13th September 1876.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
vs.
STEPHEN T. SIMMONS. } No. 418.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

THE UNITED STATES
vs.
STEPHEN T. SIMMONS. } No. 418.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

The record presents a certificate of difference of opinion upon the validity of an indictment, and is so brief that its contents need not be repeated here.

The operative words of the second count are as follows: "*Did knowingly and unlawfully cause and procure to be used a still, boiler, and other vessel for the purpose of distilling within the intent and meaning of the internal-revenue laws of the United States, in a certain building and on certain premises where vinegar was manufactured and produced.*"

Section 3266 of the Revised Statutes, upon which the

above count is founded, is, so far as important, as follows: "*No person shall use any still, boiler, or other vessel for the purpose of distilling * * * in any building or on any premises where beer, * * * vinegar, * * * are manufactured or produced, * * * and every person who does any of the acts prohibited by this section, or aids or assists therein, or causes, or procures the same to be done, shall be fined* $1,000 *and imprisoned not less than six months nor more than two years, in the discretion,*" &c.

1. The case upon the above count resembles that of the United States *vs.* Mills (7 Peters, 138), where the defendant was charged with having *procured* one Straghan, a mail-carrier, to embezzle a letter. The indictment pursued the words of the statute, and the court held that to be sufficient.

If the present form had charged Simmons with having procured *some named person* to use the still, &c., it would substantially conform to the case of Mills; so, if it had charged him with having so procured *some person or persons to the jury unknown.* Inasmuch, then, as the admissibility of the latter phrase in an indictment is consistent with a full defense, it seems that an indictment for the *statutory misdemeanor* of procuring another misdemeanor to be committed, an indictment which, therefore, is not clogged by the strict rules that govern indictments at common law, the defendant is not *prejudiced* (Revised Statutes, sec. 1025) by an omission to state either who it was whom he *procured* or that it was somebody unknown. If the grand jury were ignorant of some matter *essential* to the fairness of a trial, a statement of such ignorance would not excuse the absence of such matter. That in cases like the present an aver-

ment of ignorance covers the fault shows that such fault is one only of form. If the present case were for a *common-law* procurement, no doubt the principles of common-law pleading (established in ages of great formality) would require an allegation of the name of the party procured or that it was unknown, but here there are no such principles, and so the court can examine into the materiality of the allegation, carrying along with them all the while, as a first principle, the rule that if the form pursue the statute it is sufficient.

(*a*) It seems to me plain that when a certain public act defines a particular word, an indictment which employs that word within the purview of—and with an express reference to—such act, employs it *as so defined*. Therefore, as section 3247 of the Revised Statutes, being a part of the title, *Internal Revenue*, defines the word "distiller," an indictment founded upon an act in the same title need go no farther than to use the word "distilling"; that being also the word employed in such last-named act to specify the offense prohibited. The definition is *matter of law*, and need not be averred.

2. The operative words of the fourth count, so far as they are before this court, are as follows: "*Did knowingly and unlawfully engage in and carry on the business of a distiller within the intent and meaning of the internal-revenue laws of the United States, with intent to defraud the United States of the tax on the spirits distilled by him.*"

The foundation of this count is section 3281 of the Revised Statutes, which, so far as material, is as follows: "*Every person who carries on the business of a distiller without having given bond, as required by law, or who engages in or carries on the business of a distiller with intent*

to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not less than $1,000 nor more than $5,000, and imprisoned not less than six months nor more than two years."

The above statute makes it a *specific* offense to become a distiller with a certain intent; the overt act is the becoming a distiller, and that, when accompanied by a certain state of mind, viz, an intent to defraud the United States of tax, constitutes a misdemeanor. Such overt act and intent are the only "ingredients" of the offense. The United States are not required to state the particular circumstances upon which they rely to show such intent. Those are merely *matter of evidence*, the setting forth of which in the pleadings would therefore be faulty.

Although the recent cases of Cruikshanks, 92 U. S., 542, and Cook, 17 Wall., 168, involved statutory *felonies*, to which, of course, stricter rules of pleading apply than to the case now before the court, yet the principles there laid down may be relied upon as supporting the fourth count (above); and, with a slight modification, *proper in cases of misdemeanors*, also the second.

S. F. PHILLIPS,
Solicitor-General.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1877.

The UNITED STATES,

against

STEPHEN I. SIMMONS.

No. 418.

ON A

Certificate of Division of Opinion,

BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES, FOR THE EASTERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

Brief and Points for Defendant.

B. F. TRACY, AND JOHN J. ALLEN,

Of Counsel for Defendant.

R. P. MORLE, PRINTER, COR. MONTAGUE AND CLINTON STS., BROOKLYN.

1878.

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IN THE

Supreme Court of the United States. 1

OCTOBER TERM, 1877.

THE UNITED STATES
vs.
STEPHEN I. SIMMONS
} No. 418.

2

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

Defendant's Brief and Points.

The defendant was indicted at the November Term, 1874, of the U. S. Circuit Court, Eastern District of New York, in the Second Circuit.

The indictment contained four counts purporting to charge violations of the Internal Revenue Laws of the United States, relating to distilled spirits, and was drawn under the following sections of the Revised Statutes: 3

The first	Count	under section	3258.
The second	"	"	3266.
The third	"	"	3259.
The fourth	"	"	3281.

On the trial of the case, at the November Term, 1875, before the Court and a jury, a verdict of guilty upon each count was rendered.

At the January Term, 1876, a motion in arrest of judgment was heard before the Honorable Alexander S. Johnson, Circuit Judge, and the Honorable Charles L. Benedict, District Judge.

Thereupon, the *First* and *Third* Counts were held to be defective, and, respecting the validity of the *Second* and *Fourth Counts* of the indictment, the Court certified a difference of opinion.

The *Second Count* of the indictment is as follows:—

"And the jurors aforesaid, on their oaths and "affirmations aforesaid, do further present, that "Stephen I. Simmons, late of the city of Brooklyn, "county of Kings, in the district aforesaid, hereto- "fore, to wit: on the 28th day of August in the "year one thousand eight hundred and seventy- "four, and on divers other days and times, be- "tween the first day of May, in the year one "thousand eight hundred and seventy-four, and "the twenty-eighth day of August, in the year "one thousand eight hundred and seventy-four, at "Grand street, in the city of Brooklyn, in the "Eastern District of New York, and within the "jurisdiction of this Court, *did, knowingly and* "*unlawfully, cause and procure to be used a* STILL, "*boiler and other vessels, for the purpose of* DIS- "TILLING, *within the intent and meaning of the* "*internal revenue laws of the United States, in a* "*certain building and on certain premises where* "*vinegar was manufactured and produced*, against "the peace of the United States and their dignity, "and against the form of the statute of the said "United States in such case made and provided."

The material portion of the statute upon which this Count is based, is as follows :

" No person shall *use any still, boiler or other* " *vessel for the purpose of distilling* * * * *in* " *any building, or on any premises where* * * * " *vinegar or ether* * * are *manufactured or* 7 " *produced* * * * : and *every person who* does " any of the acts prohibited by this section, or aids " or assists therein, or *causes or procures the same* " *to be done* shall, &c." (U. S. Rev. Stat., § 3266.)

Respecting this count, the Court certified the following questions:

First.—Whether it is sufficient, in an indictment drawn under that portion of section 3,266 of the Revised Statutes which prohibits the use of a still, boiler, or other vessel for the purpose of distilling in any building or on premises where vinegar is manufactured or produced, to charge the offence in the words of the statute. 8

Second.—Whether the omission, from the second count of the indictment, of an averment that the distilling there referred to was distilling alcoholic spirits is a valid objection to said count.

The *Fourth Count* of the indictment is as follows:—

" And the jurors aforesaid, on their oaths and " affirmations aforesaid, do further present, that " Stephen I. Simmons, late of the city of Brook- " lyn and County of Kings, in the district afore- " said, heretofore, to wit, on the 28th day of " August, in the year of our Lord one thousand 9 " eight hundred and seventy-four, and on divers " other days and times between the first day of " May, in the year eighteen hundred and seventy " four, and the twenty-eighth day of August, in " the year eighteen hundred and seventy four, at " the City of Brooklyn, in the Eastern District of

"New York, and within the jurisdiction of this "court, *did knowingly and unlawfully carry on* "*the business of a* DISTILLER, *within the intent* "*and meaning of the internal-revenue laws of* "*the United States*, WITHOUT HAVING GIVEN A "BOND *as required by law, by the statutes of the*
10 "*United States in such case made and provided* "*required to be given by every distiller, and, did* "*knowingly and unlawfully* ENGAGE IN AND "CARRY ON THE BUSINESS OF A DISTILLER, *with-* "*in the intent and meaning of the internal* "*revenue laws of the United States*, WITH INTENT "TO DEFRAUD *the United States* of the tax on the "spirits distilled by him, against the peace of the "United States and their dignity, and against the "form of the statute of the United States in such "case made and provided."

The portion of the statute which forms the basis
11 of this count is as follows:—

"Every person who carries on the business of a "distiller, without having given bond as required "by law, or *who engages in or carries on the* "*business of a distiller, with intent to defraud* "*the United States of the tax on the spirits dis-* "*tilled by him*, * * * shall, &c." U. S. Rev. Stat., § 3281.]

Respecting this count, the Court certified the following questions:

12 FIRST.—Whether it is sufficient, in an indictment drawn under that portion of Section 3281 of the Revised Statutes of the United States which prohibits the carrying on of the business of a distiller with intent to defraud the United States of the tax on spirits distilled, it is sufficient to charge the offence in the words of the statute.

SECOND.—Whether it is a fatal objection to the fourth count of said indictment, that there is omitted therefrom an averment of the particular means employed by the accused to defraud the United States of the tax on the spirits distilled by him.

THIRD.—Whether that portion of the fourth count, which charges the accused with carrying on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, is a valid count upon which, with the verdict, judgment can be pronounced against the defendant.

13

POINTS.

Before proceeding to the consideration in detail of the counts of the indictment referred to, we may 14
observe that, to satisfy the rules of criminal pleading, an indictment must contain a plain and concise statement of the facts constituting the offence.

The prosecution will not be permitted to prove more than has been averred in the indictment.

If every fact stated in the indictment may be true, and yet no crime have been committed, the indictment is insufficient.

Pleadings in civil cases even cannot be argumentative. Every fact necessary to constitute a cause of action must be directly and distinctly averred. 15
Arguments, inferences and matters of law, are to be excluded.

Lipe v. Becker, 1 *Den.*, 568.

So in criminal pleading all the requisites to constitute the charge must be alleged.

U. S. v. Clark, 1 *Gall.*, 497.

The special matter of the whole fact must be set forth with such certainty, that the offence charged will judicially appear to the court.

* *Whar.*, 285. *1 *Archb.* 86-2, *Note.*

16 It is a familiar principle of criminal pleading, that when an act is indictable only under certain conditions, then these conditions must be stated in the indictment in order to show that the act is indictable. Nor does it make any difference that the offence is so made by statute.

Whar., 2705.

Judgment upon the verdict herein should be arrested upon the following grounds:

17

I.

The SECOND COUNT of the indictment is bad:—

Because it avers only that the defendant did "*unlawfully cause and procure to be used a still*, "*&c.*," and fails to set forth either (*a*) the means employed to effect the alleged unlawful procurement, or (*b*) the name of the person through whom the defendant caused the still to be used, or (*c*) that the still in question ever was used.

(*a.*) The averment, "*did unlawfully cause and*
18 "*procure*, &c.," is insufficient.

It states no *fact*; gives the defendant no information, but avers simply a legal conclusion; that the acts committed by him amounted to unlawfully causing and procuring a still to be used. But

*The references are to Wharton on Crim. Law, 7th Ed., and Archbold's Crim. Pr. and Pl., 6th Ed., Waterman's Notes.

whether the acts committed by the defendant amounted to the unlawful use of a still or procurement of such use can only be determined when such acts are made to appear. These acts should be set forth in detail in the indictment:—*first*, to enable the Court to determine, as matter of law, whether the acts do constitute an unlawful procuring, and *second*, to give the defendant notice of the particular acts relied upon as constituting the crime charged.

(*b.*) It will be observed that the indictment does not charge the defendant with using a still but with "*causing or procuring*" one to be used.

In such case the pleader is bound to name the person by or through whom the defendant caused the still to be used, or if the name of such person is unknown, such fact must be set forth in the indictment. And it must be averred, in substance, that the act was committed by the person named, in pursuance of the advice and procurement of the defendant.

(*c.*) It is not alleged that any person ever used the still in question. Such an averment is necessary.

U. S. v. *Mills*, 7 *Pet.*, 138.

II.

The SECOND COUNT is bad:—

Because it charges no offense. It avers that the defendant did "*cause and procure to be used a still, "boiler and other vessel for the purpose of distilling, within the intent and meaning of the "Internal Revenue Laws * * * in a certain "building * * where vinegar was manufactured,*"

but the indictment does not allege what kind of distilling was there carried on.

It does not appear that the distilling was of a character forbidden by the law. No such *fact* is averred.

22

The only averment upon this subject is that the distilling was "within the intent and meaning of "the Internal Revenue Laws."

This is the averment of a *legal conclusion*, and not of a *fact*.

It does not tend to define or specify the kind or description of distilling there carried on.

Such an averment renders the count void for uncertainty.

23 This still and the particular kind of distilling should have been described so as to bring it within the statute.

"*Still*" is the name of a class, of which there are many species and varieties, and "*distilling*" is a word of general application, and it is well settled that when a generic term enters into the statement of the offence, under statute or common law, it is not enough to charge the offence in the same generic terms; it must state the species,—the particulars must be given.

1 *Archb.*, 88.

24

To use, in a vinegar manufactory, a "*still*" for the purpose of "*distilling*," is not unlawful; it is only the use of a still for distilling *alcoholic spirits*, which is an offence.

When the act itself is not necessarily unlawful, but becomes so by its peculiar circumstances and

relations, all the matters must be set forth in which its illegality consists.

Archb., 86, *Note*. *Whar.*, 285.

An indictment upon a statute must state all the facts and circumstances which constitute the statutory offence, so as to bring the defendant precisely within the statute, whether the crime charged be a misdemeanor or a felony. 25

People v. Wilbur, 4 *Park Cr.*, 19.
Enright v. People. 21 *How. Pr., N. Y.*, 383.
People v. Allen 5 *Den.* 76.
Also 1 *Hale*, 517, 526, 535. 1 *Archb.* 86-2, *Note*.

Under the U. S. statutes declaring it an offence to "*make a recolt*," to aver that defendant "*made a recolt*" was held to be bad. 26

U. S. v. Almedia., *Whar.*, 285 (*Note*), 372 *and* 2705

Under a statute making an attempt to commit a certain offence a misdemeanor, it was held not enough to charge that the defendant "*attempted to maim*;" the particulars must be stated.

Whar., 372.

The special matter of the whole fact must be set forth with such certainty that the offence charged will judicially appear to the court. 27

Whar., 285, *and cases cited*.

All the requisites to constitute the charge must be alleged.

U. S. v. Clark., 1 *Gall* 497.

The operation of the law, being limited to the use of a *still* for *distilling alcholic spirits*, is less comprehensive than the words of the statute, and the rule is well settled that where the application of the law is narrower than the general words used in the statute, the indictment must correspond
28 with the judicial interpretation.

U. S. v. Pond, 2 *Curt. C. C.*, 265. 1 *Bish. C. P.*, 372.

More than the words of the statute must be used so as to bring the offence described clearly within the evident application of the law.

The precise language of the statute relating to the offence must be expressed, and *also* all the circumstances which make up the statutable definition of the offence.

29 *U. S. vs. Bentilini*, 15 *Int. Rev. Rec.*, 32.

An indictment charging defendant, as a *dealer in tobacco* without payment of special tax, must show that he was such a dealer as is by law required to pay tax.

U. S. vs. Howard, 1 *Sum.*, 507, 510.

In describing statutory offences nothing can be left to implication.

U. S. vs. Staats, 8 *How.*, 41.

30

And an indictment for a misdemeanor must with certainty describe the offence charged so that the accused may be clearly apprised thereof.

U. S. vs. Mills, 7 *Pet.*, 138.

It will probably be sufficient, however, to refer to the opinion of Judge Lowell upon this identical point.

U. S. vs. Reed, 1 *Low.*, 232.

In this case the accused was charged with failure to notify the Collector of a still made, &c.

He says that "the law means that when a still is made for the "purpose of distilling (*spirits within the United States*), the maker 31
"is to notify the Collector (*of internal revenue of the District in which "it is intended to be used*), where it is to be used or sent, &c. :—the "words in brackets should be supplied by the indictment:—when "the statute is eliptical so that its meaning must be gathered from the "context or from other parts of the same, or other statutes, the in-"dictment must of itself allege a crime according to the *true intent* of "the statute. Every fact here charged would be true of a still for "making petroleum removed for shipment to Canada."

It may be suggested that this opinion was written while petroleum was subject to tax.

Nevertheless the principle remains the same. That spirits and petroleum were both subjects of taxation is not stated or intimated as a ground 32
upon which the decision is based.

Besides, at the time this opinion was delivered, the only stills whose use was regulated by law were *spirit* stills.

The necessity of distinguishing between spirit and petroleum distilling particularly, is not suggested by Judge Lowell. He reiterates, as applicable to such a case as the present, an established principle of law governing criminal pleading.

This principle of criminal pleading, for which we contend, in its application to an indictment 33
drawn in the mere words of the statute, has been since the trial of the case at bar, further sustained by this Court, in the case of "*Cruikshank, et al.*," and we may be permitted to recall the language of the opinion.

"The object of the indictment is first to furnish "the accused with such a description of the charge "against him, as will enable him to make his de-

"fence, and avail himself of his conviction or ac-
"quittal for protection against a further prosecu-
"tion for the same cause; and second, to inform
"the Court of the facts alleged, so that it may de-
"cide whether they are sufficient in law to support
"a conviction, if one should be had. For this,
34 "facts are to be stated, not conclusions of law
"alone.

"A crime is made up of acts and intent; and
"these must be set forth in the indictment with
"reasonable particularity of time, place and circum-
"stance." * * * *

"The indictment should state the particulars, to
"inform the Court as well as the accused.

"It must be made to appear—that is to say, ap-
"pear from the indictment without going further—
"that the acts charged will, if proved, support a
35 "conviction for the offence alleged."

U. S. v. Cruikshank, et al., 92 *U. S. Rep.*, 542-558.

The testimony before the grand jury may have related to the use of a still for distilling vinegar, in the process of its manufacture, or acetic acid, or for purifying, or other lawful purpose.

That would have sufficed to enable them to find this indictment. And yet in such case no offence
36 would have been committed.

There is as good reason for such assumption as for any other. Why is it to be presumed that reference is made only to a *still for distilling alcoholic spirits?* Nothing in the language of the indictment indicates this.

Nor can these defects in the indictment be cured by proof.

People v. Gaige, Green. Cr. L. R., 524.

If all the facts stated in the indictment may be true and yet no crime have been committed, the indictment is insufficient.

Applying this rule to the present case, we find that every fact alleged in this count might be true of a person admitted to be innocent of the offence 37
sought to be charged against the defendant. It is clear, therefore, that judgment should not be rendered upon it.

The foregoing objections apply equally, to the *fourth count* of the indictment, and are fatal to it also.

(Some additional authorities bearing upon this point will be found in connection with our remarks upon the *fourth* count.)

38

III.

The SECOND COUNT is bad:—

Because it does not identify the particular place where the still was used.

The indictment should so identify the charge and define the offence by such circumstances as will enable the defendant to plead previous acquittal or 39
conviction.

Whar., 300-304.

It should show on its face facts which will so individuate the offence as to secure the offender from a second conviction.

Whar., 294.

The still, or the place where the same was used, are not so identified in this indictment.

The charge as made would apply equally well to the use of any one of many other stills in vinegar factories in Brooklyn, if the defendant were ac-
40 cused of connection with the same.

IV.

The SECOND COUNT is bad:—

It does not allege that vinegar was being made in the building at the time named, when the still was in operation.

The words "*was manufactured*" may refer to a period long anterior to the period charged, and,
41 gramatically construed, place the manufacture of the vinegar *before* the using of the still. This being so, no offence is charged.

V.

The FOURTH COUNT of the indictment is bad:—

Because it fails to aver any fact constituting an offence under the law; it does not allege that the defendant carried on the business of a *distiller* of SPIRITS with intent to defraud.
42

It is as essential in this as in the second count to aver that the defendant was a distiller of *spirits*, and the argument upon that point, heretofore presented, need not be repeated.

The allegation that the intent of the defendant was "to defraud the U. S. of the tax on the spirits "distilled by him" does not define the term "*Dis-*

tiller," or limit it so that it must be taken to be "Distiller of *Spirits*."

To hold that the charge must be deemed to be "Distiller of *Spirits*," because it is the *tax* on *spirits*, respecting which fraud is averred, is an *argumentative inference*, and no such inference 43
will supply the *want* of *averments* of *material facts*.

U. S. v. *Clark*, 1 *Gal.*, 497.

It is clear that the fact that the defendant was a Distiller of *Spirits* is not alleged.

Such an averment can therefore be derived only by *implication*, and hence cannot be regarded as entering into the description of the offence.

U. S. vs. *Staats*, 8 *How.*, 41.
See also Whar., 366.

44

The defendant may have been a *Coal Oil* Distiller at the place named in the indictment, and the Grand Jury may have intended to charge that he carried on that business to enable him to defraud the U. S. of tax on spirits distilled by him at a spirit distillery situated elsewhere, and, for aught that appears, duly licensed, &c. This business of a distiller (of coal oil or turpentine) described in the indictment, may well have been considered by the Grand Jury to have been managed and so carried on as to "cover" or facilitate fraud at another distillery of *spirits* which they believed belonged to the defendant. 45

If the precise nature of the charge is to be implied from the language accidently used,—is to be reasoned out by a process of argument, then we shall have innumerable theories, each apparently founded upon fact, but all, nevertheless, pure fiction.

There is no authority for such pleading; all the authorities are against it.

VI.

The FOURTH COUNT is bad:—

Because it does not aver by what means the United States were to be defrauded.

46

Fraud is an *inference of law* from certain facts which must *all* be alleged in the indictment.

No mere averment of fraudulent intent can supply the want of them. The deceitful practices by which the fraud is perpetrated must be set forth, so that the Court can judge whether the charge of fraud can be inferred from the acts done.

U. S. v. *Watkins*, 3 *Cr. C. C.*, 441, 453, *and many other authorities.*

How the United States could be defrauded must be shown.

47

People v. *Gales*, 13 *Wend.*, 311.

An indictment for smuggling is bad if it does not show the facts constituting the illegality of the importation, and state also the particular irregularity to be proved.

U. S. v. *Thomas*, 4 *Ben.* 370.

An indictment on a statute for obtaining goods on false pretenses, with intent to defraud, must set forth all the material facts and circumstances necessary to be proved to procure conviction.

Bish. Cr. Pr., 141.

48

An indictment for "*fraud*" in electing officers, must show what the fraud was.

Whar. 372.

An information under the *Conn. Stat.* for fraud in hiring a horse, and making a false statement of time, distance, &c., must, it is held, describe the offence in the words of the statute and also

set forth the misrepresentation and person to whom made.

State v. *Jackson*, 1872, 39 *Conn.*, 299.

An indictment for a statutory offence must with precision charge the commission of all the acts constituting the offence, under the circumstances mentioned in the statute. 49

1 *Hale*, 517, 526, 535.
1 *Archb.*, 86-2, *Note*.

If fraudulent practices, having different characteristics, or if violations of the law, by different modes, are intended to be covered by the provisions of a statute, then the offence complained of should be described in more than the words of the act.

U. S. v. *Claflin*, 13 *Blatch.*, 178.

Th[illegible] *fraud being a conclusion of law*, the statement of the offence in the words of the statute is but a *statement of a legal conclusion*. 50

It is the rule that if the statute is in terms constituting a legal conclusion the offence must be specifically described in more than the words of the statute, so as to bring it within the legal conclusion.

All the requisites to constitute the charge must be alleged.

U. S. v. Clark, 1 *Gall.*, 497.

The special matter of the whole fact must be set forth with such certainty that the offence charged will judicially appear to the Court. 51

Whar., 285.

It is not enough that the mere words of the statute are followed. To "engage in and carry on the business of a distiller" is lawful, and the business is one encouraged by the internal revenue laws,

and the doing of such a lawful act with a fraudulent intent is not an offence against any law nor can it be made such. So the averment that the defendant engaged in the business of a *distiller* with an intent to defraud, is not an averment of any offence.

52 Something in the mode of carrying on the business, in the character and operation of the apparatus, or the like, affording opportunity for fraud, must have existed and must be set forth.

VII.

The FOURTH COUNT is bad :—

Because the language of the charge *does not aver any unlawful* ACT; there is no allegation that
53 anything beyond a mere conception of fraud ever existed.

The indictment avers merely the carrying on of a business, lawful in itself, with an *intent* to defraud the U. S. of a tax on a *future* product.

It sets forth that the defendant did "*engage in* "*and carry on the business of a distiller* * * * "*with intent to defraud the United States*, &c."

The offence charged is *the possession of an evil intent*, which is an offence only in name and pun-
54 ished by no law, statute or common.

Acts and *deeds* are the proper subjects of human laws, not *thoughts* and *intents*.

Barb. Cr. L., 245.

It may be said that laws relating to "conspiracy" in some instances punish when no act has been done to effect the object of the conspiracy. But this is because the "*conspiracy*" is the *offence*, and *it* is

perfect when the agreement between the conspirators has been completed. Yet even here there is an *act*, viz.: the entering into the agreement. The mere *intent to conspire* is nowhere sought to be punished.

If it is not necessary to describe the manner of carrying out the object of the conspiracy, it is because the offence exists in the act of conspiring, and a statement of its consequences is not essential to a description of the offence itself. 55

It is conceded that Congress cannot punish for a merely criminal intent. No civilized power attempts to deal with men's thoughts or intentions.

It is only where effect is attempted to be given to the criminal intent by some physical act that such act may be punished as a crime or as an attempt to commit crime.

56

It is not argued that Congress cannot punish *attempts* to commit crime. It undoubtedly may. And particular acts which are innocent when done with a lawful intent may be declared to be crimes when done with a criminal intent.

But it is the *act* and not the *intent* which is unlawful.

The crime consists in the doing of the act with a criminal intent and not in the *intent itself*.

But the act cannot be unlawful except where it becomes a step in the commission of a crime—an attempt to commit an offence. 57

Attempts may be merely in conception, or in preparation, with no casual connection between the attempt and any particular crime; but, in such cases, the attempts are not cognizable by the penal law.

Whar., 2705.

In an indictment for an attempt to commit a crime, it is essential to aver that the defendant did some *act*, which, directed by a particular intent, which must be averred, would have apparently resulted in the ordinary and probable course of things, in a particular crime.

58 *Whar.*, 2705.

One who carries on the business of a distiller in a lawful manner cannot be said to commit an act which would apparently result, "in the ordinary and probable course of things," in a crime.

A man who intends to commit a crime and does some act tending towards the consummation of it, may be punished for the act committed.

It cannot be pretended that the carrying on the business of a distiller is the *act* calling for pun-
59 ishment. To carry on the business of a distiller is not an offence, nor can it be made such by the presence, in the mind, of a purpose however evil, but toward the accomplishment of which no step has yet been taken.

A criminal intent may be affirmed of a particular act, but never of a general lawful business.

One who engages in and carries on a lawful business in a lawful manner cannot be guilty of an offence *whatever his intent may have been.*

To attempt to punish one who engages in a law-
60 ful business and prosecutes it in a lawful manner, but with a criminal intent is an attempt to punish the *intent* and not the *act.*

It is undoubtedly competent for Congress to declare that any distiller who shall do any act with intent to defraud the Government shall be punished.

It is equally clear that Congress *has no power* to say that any person who, being a distiller, shall *intend* to defraud the Government, shall be liable to punishment.

In the one case the *act* is made the offence, in the other the *intent*.

If the Statute had provided that any person who, being a distiller, should *do any act* with intent to defraud, &c., it would simply punish the commission of a fraudulent *act*, not an intent to commit fraud at some future indefinite time. 61

The statute in question declares that *any one who shall engage in or carry on the business of a distiller with intent*, &c., shall be guilty, &c.

There is no difference between a statute declaring that any person *who shall carry on a business with intent to defraud* shall be punished, and one which provides that *any one carrying on a business who shall intend to defraud* shall be punished. Would not both acts mean substantially the same thing? And would not both punish for 62
the *intent* rather than for any particular act?

If Congress can provide that any person who shall carry on the business of a distiller with *intent*, &c., shall be guilty, &c., then it may declare generally that any person who engages in a commercial or other business with intent to defraud, shall be guilty, &c.

But a general intent to defraud is not sufficient; the indictment should state what particular fraud he intended to commit. A general averment of a fraudulent intent is clearly insufficient.

63

Suppose a man, who has long been engaged in the business of distilling, and whose every act has been regular and lawful, is indicted for carrying on the business with intent to defraud the United States. That he is carrying on the business he knows; that every act of his has been regular and lawful he also knows. What information does such an in-

dictment give to such a man? And how can he plead a former conviction or acquittal in bar of a subsequent indictment?

The question is, what was his intention on a particular day, and if the fraudulent intent existed on that day, and it be coupled with an illegal act, he
64 is guilty. And does the conviction or acquittal cover any day except the one stated in the indictment?

The indictment may aver that the defendant had the intent upon a particular day, and upon trial he may be acquitted or convicted.

The same testimony may be given to a subsequent Grand Jury, who may find the intent to have existed upon the next day, and so charge in a new indictment. How could the defendant plead a former acquittal or conviction?

Or how, in either case, could he know of what
65 he was charged so as to enable him properly to defend?

It was suggested, upon the argument in the Court below, that the statutes enacted for the suppression of the slave trade are directed to the *intent*. We reply that none of those statutes impose or seek to impose punishment upon *the possession of an evil intent*. They attach the penalty only to *the illegal act*.

It cannot be said that one who fits up a vessel with intent to employ her in the slave trade does a *lawful act* with an evil intent.

66

The purpose for which the vessel is intended determines whether or no the fitting up of her is a lawful or an unlawful act. She is a *slaver* from the first, and as such may not lawfully be built or fitted up, and she remains a *slaver* so long as the *intention* of her owner gives her such a character, and the law punishes not the fitting up of the *vessel*, but the creation of a *slaver*.

punishment.

Congress has never attempted to inflict a penalty upon the possession of an intent to engage in the slave trade, neither has it the power to declare that any person engaged in the merchant shipping business, for example, who shall intend to employ vessels in the slave trade, shall be punished.

67

The law forfeiting a vessel fitted out for the slave trade is considered by Thompson, J. S. C., in *U. S.* vs. "*The Emily*," *etc.*, 9 *Wheat.*, 381-389.

He says:

"The law looks at the intention, and furnishes "authority to take from the offender the means "designed for the perpetration of the mischief.

"This is not punishing, criminally, the intention "merely: it is the preparation of the vessel, and "the purpose for which she is to be employed, "that constitute the offence, and draw after it the 68 "penalty of forfeiture.

"As soon, therefore, as the preparations have "progressed so far as *clearly* and *satisfactorily to* "*show the purpose* for which they are made, the "right of seizure attaches.

" * * * The intention or purpose for which "the vessel is fitting must be made out so as to "leave no reasonable doubt as to the object"

In *U. S.* v. *Gooding*, 12 *Wheat.*, 460, 472, (indictment under the slave trade act) it is said:

"The statute punishes the fitting out of a vessel 69 "with intent to employ her in the slave trade. * * "It is the *act, combined with the intent*, and not "either separately which is punishable."

* * * * * *

"It" (the statute in question) "imputes no "guilt to any particulars of the equipment, but to "the act combined with the illegal intent."

In the case last cited, one count charged "with "intent *that the vessel should be employed* in the "slave trade."

The statute reads, "with intent *to employ the vessel*."

70 It was held that there was a clear distinction between these averments. It might be *argued* that the indictment charged the offence covered by the statute, and the evidence might sustain the count but the Court says:

"There is *no reason, in criminal cases, why the "Court should help any such defective allega-"tions.*"

VIII.

71 None of the defects referred to are aided or cured by the verdict.

A failure to state with precision all the acts constituting the statutory offence, is not cured by verdict, or by the addition of "*contra formam statuti.*"

1 *Hale*, 517, 526, 535.
1 *Archb.*, 86-2, *Note*.

Only defects in form not affecting any right of the defendant can be cured by verdict.

Fillinger v. *The People*, 15 *Abb. Pr.*, 128.

72 A count bad for duplicity is not cured by verdict.
Whar., 382.

If a circumstance which is a necessary ingredient of the offence be omitted, or stated without sufficient certainty, it vitiates the indictment and the defendant may move in arrest of judgment.

Barb. C. L. 320, 372.

[illegible] government, shall be liable to punishment

Defects in the description of a statutory offence are not cured by verdict, at Common Law.

Whar., sec. 369.

When an indictment for a misdemeanor is defective, judgment will be arrested.

U. S. v. *Fox*, 1 *Low*, 199. 73
" " *Gooding*, 12 *Wheat.*, 460-479.

In view of the foregoing, we submit that judgment should be arrested.

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